United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7031

To be argued by
WILLIAM F. TUETING

United States Court of Appeals
FOR THE SECOND CIRCUIT

THE BOHACK CORPORATION,

Plaintiff-Appellant,

against

ALISON MORTGAGE INVESTMENT TRUST,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
(74 Civ. 518)

BRIEF FOR DEFENDANT-APPELLEE

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Issue Presented

Has Congress extended the diversity jurisdiction authorized by Art. III, § 2 of the United States Constitution to include suits against unincorporated real estate investment trusts when there is not complete diversity of citizenship between the plaintiff and all of the owners of shares of beneficial interest of the real estate investment trust?

Statement of the Case

This action, for alleged breach of a contract to make a loan for the development of a supermarket and shopping center in New Jersey, was commenced by The Bohack Corporation (hereinafter "Bohack") on April 2, 1974 (1a;

80a). The complaint seeks damages in the total amount of $11,398,352 in four separate claims for relief (84a). Thereafter, defendant Alison Mortgage Investment Trust (hereinafter "Alison") moved, pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure, for an order dismissing the complaint on the ground that the district court lacked jurisdiction over the subject matter of this action (8a). While it is nowhere stated in the complaint or in Bohack's brief on this appeal, Bohack presumably predicates federal jurisdiction on 28 U.S.C. § 1332.

The District Court (per Weinstein, J.) (5a) dismissed the complaint finding that Alison was an unincorporated entity and that roughly one-quarter of its shareholders were residents of New York State when the action was commenced. It further found that Bohack was a corporation organized under the laws of New York and that the complete diversity of citizenship among the parties required by 28 U.S.C. § 1332 did not exist. No formal opinion was written by the District Court and its findings were recited in the order dismissing the complaint (5a), which is the order from which this appeal is taken.*

Statement of Facts

Since the sole issue presented on this appeal is whether diversity of citizenship exists between the parties, the only relevant facts are those which relate to the determination of the citizenship of Bohack and Alison. Bohack was, at the time the action was commenced, a corporation or-

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* We are aware that Appellant's Notice of Appeal recites the Order of the District Court entered December 12, 1975 as the order appealed from, while a judgment was entered on December 16, 1975. We assume that there has been sufficient compliance with 28 U.S.C. § 1291 to cause this Court to entertain the appeal. *Markham* v. *Holt*, 369 F.2d 940 (5th Cir. 1966); 9 *Moore's Federal Practice* (2d Ed.) ¶ 110.08[2] at p. 120.

ganized under the laws of the State of New York with its principal place of business in Queens County, New York (80a).

Alison was, on April 2, 1974 when this action was commenced, a real estate investment trust organized by the execution and recording of a Declaration of Trust, dated June 17, 1969, pursuant to § 23000 of the California Corporations Code (12a, *et seq.*). Alison has outstanding approximately 2,339,417 transferable shares of beneficial interest (hereinafter, for convenience, "shares") (15a) which are listed on the New York Stock Exchange (13a). On April 2, 1974, there were 436 individual Alison shareholders who were residents of the State of New York (38a; 39a).

POINT I

The District Court correctly applied settled law in determining that for diversity purposes an unincorporated entity is a citizen of each state of which its members are citizens.

Pursuant to 28 U.S.C. § 1332, the federal district courts have original jurisdiction over civil actions between "citizens of different states". With certain exceptions not present in the instant case (such as interpleader actions under 28 U.S.C. § 1335) the diversity of citizenship required by 28 U.S.C. § 1332 is complete diversity of citizenship between all original parties in interest. Thus, each plaintiff must be a citizen of a state different from that of *each and every* defendant. *Strawbridge* v. *Curtiss,* 7 U.S. (3 Cranch) 267 (1806). Bohack, of course, has the burden of pleading and proving facts entitling it to invoke federal jurisdiction. *McNutt* v. *General Motors Acceptance Corp.,* 298 U.S. 178 (1936); *Birmingham Post Co.* v. *Brown,* 217 F.2d 127 (5th Cir. 1954).

With the exceptions of the Fourteenth Amendment and 28 U.S.C. § 1332(c), however, there is no constitutional or statutory definition of "citizens".*

In *Marshall* v. *Baltimore and Ohio R.R.*, 57 U.S. (16 How.) 314 (1853), the Supreme Court adopted the fiction that for diversity purposes all the shareholders of a corporation were to be deemed citizens of the state of its incorporation. The federal courts and Congress have consistently refused to extend to partnerships, joint stock associations and other unincorporated entities either the *Marshall* fiction of corporate single citizenship or the corporate dual citizenship of 28 U.S.C. § 1332(c).

Historically, a corporation was the only form of business association viewed as an entity separate and distinct from its individual members or shareholders.** Consistent with such view, an unincorporated association had no existence

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* 28 U.S.C. § 1332(c), adopted in 1958, provides:

> "For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: . . ."

The Fourteenth Amendment, which provides that "Persons born or naturalized in the United States, . . . are citizens of the . . . State wherein they reside", is not an exclusive definition of "citizens" on its face and legislation has conferred citizenship beyond the limits of that amendment. See *Anderson* v. *A&W Tractor Products, Inc.*, 181 F. Supp. 90 (S.D. Ill. 1960); *Harlan* v. *Pennsylvania R.R.*, 180 F. Supp. 725 (W.D. Pa. 1960) (both cases held that 28 U.S.C. § 1332(c) was constitutional). For litigants other than natural persons and corporations, however, there is no definition of citizenship for diversity purposes.

** Originally, the Supreme Court had held that a corporation could not be a citizen at all. *Hope Ins. Co.* v. *Boardman*, 9 U.S. (5 Cranch) 57 (1809). The Court later held that a corporation was a citizen of the state of its incorporation for the purpose of suing and being sued. *Louisville C. & C. R.R.* v. *Letson*, 43 U.S. (2 How.) 497, 555 (1844). This question was ultimately settled for diversity purposes in *Marshall* v. *Baltimore and Ohio R.R.*, *supra*. This result was codified and broadened by Congress with the adoption in 1958 of 28 U.S.C. § 1332(c).

as a juridical entity apart from its members. See e.g., *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344 (1922). This historical difference caused the federal courts to hold that for diversity of citizenship purposes unincorporated associations possess no separate citizenship apart from that of their individual members. See e.g., *Chapman* v. *Barney*, 129 U.S. 677 (1889).

In *Chapman, supra*, the Supreme Court held that the plaintiff, a joint stock company organized under the laws of the State of New York, could not sue in a federal court as a "citizen" of New York, since it was not a corporation. The Court stated, at 129 U.S. 682:

> "[A]lthough [plaintiff] may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a federal court . . . [since] all the members of it may not be citizens of that state."

The *Chapman* rule has been uniformly followed, with one exception discussed below, since 1889, and was reaffirmed by the Supreme Court in *United Steelworkers of America* v. *R. H. Bouligny, Inc.*, 382 U.S. 145 (1965).

In *Bouligny*, a North Carolina corporation brought a defamation action against an unincorporated labor union, which the union removed to a North Carolina federal court. The union argued that, although some of its members were North Carolina citizens, it should be considered a Pennsylvania citizen for diversity purposes since that was the situs of its principal place of business. The district court retained jurisdiction, but was reversed on interlocutory appeal by the Fourth Circuit. 336 F.2d 160 (4th Cir. 1964).

The Supreme Court affirmed, holding that for diversity purposes the citizenship of an unincorporated association is the citizenship of each of its members and that any change from this long-established rule must come from Congress

and not the courts. Justice Fortas, writing for the Court, concluded that:

> "Whether unincorporated labor unions ought to be assimilated to the status of corporations for diversity purposes, how such citizenship is to be determined, and what if any related rules ought to apply, are decisions which we believe suited to the legislative and not the judicial branch, regardless of our views as to the intrinsic merits of petitioner's argument—merits stoutly attested by widespread support for the recognition of labor unions as juridical personalities." 382 U.S. at 153.

The *Bouligny* case is especially significant since it postdated *Mason* v. *American Express Co.*, 334 F.2d 392 (2nd Cir. 1964)—the only significant deviation from the *Chapman* rule. In *Mason*, the Second Circuit held, before *Bouligny*, that a joint stock company (the precise type of entity involved in *Chapman*) was a citizen of the state of its principal place of business for diversity purposes. The *Mason* court focused on the language of the Supreme Court in an earlier decision, *Puerto Rico* v. *Russell & Co.*, 288 U.S. 476 (1933), and determined that for jurisdictional purposes an unincorporated association may possess citizenship apart from that of its individual members if its structural and organizational characteristics are sufficiently similar to those of a corporation. The Supreme Court in *Bouligny*, however, took a much narrower view both of its earlier decision in *Puerto Rico* v. *Russell*, *supra*,* and of the power of the federal courts to expand diversity jurisdiction.

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* *Puerto Rico* v. *Russell*, *supra*, was a suit instituted in an insular district court by the government of Puerto Rico to recover certain assessements levied on the lands of Russell & Company, which was organized under the laws of Puerto Rico as a *sociedad en comandita*, i.e., roughly the civil law counterpart to a

(footnote continued on following page)

While the *Mason* court viewed *Russell* as adopting a flexible test that could be applied to other unincorporated associations, the Supreme Court in *Bouligny* characterized its earlier decision in *Russell* as concerned with fitting "an exotic creation of the civil law . . . into a federal scheme which knew it not".* *Bouligny, supra,* at 151. The *Bouligny* court also pointed out that diversity of citizenship was not at issue in *Russell* and that the result of *Russell* was to deny federal jurisdiction. *Bouligny, supra,* at 152.

In *Baer* v. *United Services Automobile Association,* 503 F.2d 393 (2nd Cir. 1974), the Second Circuit acknowledged that *Mason* had been overturned by *Bouligny.* In *Baer,* the plaintiff appealed the decision of the district court granting summary judgment for defendant. The Second Circuit remanded with the direction that the complaint be dismissed for lack of subject matter jurisdiction, since the defendant was a Texas inter-insurance exchange, or reciprocal insurance association, a familiar type of unincorporated association, and diversity of citizenship was lacking.

(footnote continued from preceding page)

limited partnership. Section 41 of the Organic Act of Puerto Rico, the applicable jurisdictional statute, conferred jurisdiction on the United States District Court for the District of Puerto Rico over "all controversies where all of the parties on either side of the controversy are citizens . . . of a foreign State or States, or citizens of a State, Territory or District of the United States not domiciled in Puerto Rico . . ." Since all of the members of the *sociedad* were non-residents of Puerto Rico, they removed the case to the federal district court, which reached a decision on the merits in favor of the *sociedad.* The First Circuit affirmed, but the Supreme Court reversed for lack of jurisdiction, holding that the *sociedad* was a citizen of Puerto Rico.

* In *Russell,* the distinction between the common law and civil law approaches was clear. Unlike the common law, which consistently treated as legal persons only incorporated organizations, treating all other associations as partnerships, the civil law had "consistently regarded [the *sociedad*] as a juridical person." 288 U.S. at 481.

Of its earlier decision in *Mason,** the Second Circuit wrote:

> "For the purpose of determining whether diversity jurisdiction exists, unincorporated associations have long been considered to be citizens of each and every state in which the association has members. Thus, if the unincorporated association party to a lawsuit has any member whose state citizenship coincides with the state citizenship of any of the opposing parties in the lawsuit, a federal district court has no diversity jurisdiction. Rosendale v. Phillips, 87 F.2d 454 (2 Cir. 1937) (per curiam). Any trend toward erosion of this rule creating multiple state citizenship for unincorporated associations, see, e.g., Mason v. American Express Co., 334 F.2d 392 (2 Cir. 1964), seems to have been abruptly halted by United Steelworkers v. R. H. Bouligny, Inc., supra, 382 U.S. at 149-153, 86 S. Ct. 272." 503 F.2d at 395.

In an attempt to escape the obvious conclusion mandated by *Bouligny, supra,* and *Baer, supra, Bohack* cites two cases in support of its assertion of federal diversity jurisdiction over these state law-created contract claims. Neither supports Bohack.

In *Textile Properties, Inc.* v. *M. J. Whittall Associates, Limited,* 157 Misc. 108, 282 N.Y.S. 17 (Sup. Ct. N.Y. Co. 1934) (Appellant's Brief, p. 4), the Court determined that a Massachusetts trust is an entity which may properly be

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* *Mason* in fact reached a different result from the Sixth Circuit, which had earlier decided that the identical entity involved in *Mason,* American Express Company, was not a corporation for diversity purposes. *Brocki* v. *American Express Co.,* 279 F.2d 785 (6th Cir. 1960). The Sixth Circuit had determined that American Express, a joint stock association organized under the laws of the State of New York with thousands of stockholders, was a citizen of Michigan (among other states) for diversity purposes since 200 of its stockholders resided in Michigan.

sued in a New York state court. Alison admits that under New York law, and under Rule 17(b) of the Federal Rules of Civil Procedure, it may be sued as an entity in a federal court, but only where federal jurisdiction is properly laid* —e.g., under the federal securities laws. Capacity to be sued has, however, nothing to do with whether this particular action is properly maintained in a federal rather than state tribunal.

Bohack also asserts, citing *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), that "the character of a Massachusetts (business) trust" should be resolved by reference to state law (Appellant's Brief, p. 4). While California law governs the organization and structure of Alison, Section 1332 of Title 28 of the United States Code and federal case law determine whether diversity jurisdiction exists.

Finally, Bohack disingenuously states "This proposition, that the business trust is virtually a corporation, was upheld by the First Circuit to sustain diversity jurisdiction in the case of *Bomeisler* v. *M. Jacobson & Sons Trust,* 118 F.2d 261 (1st Cir. 1941), *cert. denied,* 314 U.S. 630" (Appellant's Brief, p. 4). However, diversity jurisdiction was sustained in *Bomeisler* because, in the words of Judge Magruder:

> "Each of the partners in the plaintiffs' firm is a citizen of a state other than Massachusetts. By stipulation filed in this Court pursuant to 28 U.S.C.A. § 399, it appears that 'at all times involved in the within litigation' all of the trustees and all of the shareholders in [defendant] have been residents of Worcester, Massachusetts. See Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449. . . ." (Further citations omitted.) 118 F.2d at 262, n. 1.

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* Fed. R. Civ. Pro. 17(b) provides, in relevant part: ". . . . In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, . . ."

In Bohack's only case on the issue on appeal, the court applied the rule of *Chapman* v. *Barney, supra,* to determine whether diversity jurisdiction was present.*

Under *Bouligny* and *Baer,* the conclusion is inescapable that, if Alison is an unincorporated entity, the long-established *Chapman* rule determines its citizenship for diversity purposes.

POINT II

The District Court correctly found Alison to be an unincorporated entity under California Law.

A. Alison Was Organized To Take Advantage Of Subchapter M Of The Internal Revenue Code And Consequently Cannot Be A Corporation.

Modern real estate trusts (commonly "REITS"), like Alison, are a product of Public Law No. 86-779, enacted by the 86th Congress, now Sections 856-858 of the Internal Revenue Code of 1954, as amended (hereinafter "Subchapter M"), although similar entities have existed for decades.**

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* The lengthy quotation from Judge Magruder's opinion printed at pages 4 and 5 of Appellant's Brief deals with the authority of trustees to act for Massachusetts business trusts and the permitted scope of the trusts' business activity. It would thus seem to be a quote for another brief at another time.

** Under nineteenth century Massachusetts law, corporations could not hold real property for investment purposes. Historically, the vehicle of the business trust was utilized to avoid this restriction and Massachusetts became its spawning ground. As distinguished from a corporation, which is a creature of statute and cannot exist without explicit statutory provisions, the business trust is a creature of the common law and exists by virtue of the many court decisions which gave cognizance to its existence and validity. Over time, the state courts, particularly those in Massachusetts, built up a substantial body of decisions supporting the validity of this concept and defining the rights, duties and responsibilities of the various parties. See e.g., Axelrod, Berger and Johnstone, *Land Transfer and Finance* (Little Brown 1st ed. 1971) p. 976.

The formation of business trusts in the early twentieth century resulted from their exemption from federal corporate income taxation under decisions such as *Crocker* v. *Malley,* 249 U.S. 223 (1919). This tax status was later denied to realty trusts and investment companies by the Supreme Court's decision in *Morrissey* v. *Commissioner,* 296 U.S. 344 (1935) which extended the corporate income tax to any business entity with sufficient corporate attributes to fall within the definition of an "association" under the Revenue Acts of 1924 and 1926. See generally, *Axelrod, Berger and Johnstone, et al., supra,* p. 976ff. In 1960, Congress largely restored the tax advantages taken away by *Morrissey,* when it enacted the REIT provisions of Subchapter M.*

To qualify for the special tax treatment accorded to REITS under the Internal Revenue Code, a REIT must adhere strictly to the statutory requirements.**

Section 856(a) of the Internal Revenue Code states that "the term 'real estate investment trust' means an unincorporated trust or an unincorporated association. . . ." As indicated below, Alison was organized to take advantage of Subchapter M (15a). For this reason, it was organized as a REIT and could not have been organized as a corporation.

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* The legislative purposes of the REIT provisions of Subchapter M were extensively explained in the House Report which accompanied the original version of the bill. See H.R. Rep. No. 2020, 86th Cong. 2d Sess. 3-4, 1960.

** In addition to dictating the organizational structure of a REIT, the Internal Revenue Code strictly delimits the nature and sources of income of a REIT. See e.g., IRC § 856(c). See generally, Stanley, *The Real Estate Investment Trust: Legal and Economic Aspects,* 24 Univ. Miami L. Rev. 155 (1968).

B. Under California Law Alison Is An Unincorporated Business Trust—Not A Corporation.

Section 23000 of the California Corporations Code* defines a real estate investment trust as:

> ". . . an unincorporated trust or association which complies or intends to comply with Sections 856, 857 and 858 of the Federal Internal Revenue Code of 1954, as amended, or such section or sections of any subsequent Internal Revenue Code as may be applicable to organizations described in Public Law 86-779."

Article A.2 of Alison's Declaration of Trust provides:

> "This Trust is a business trust for purposes of real estate investment organized under the laws of the State of California. It is intended that such trust shall qualify as a 'real estate investment trust' under the provisions of Sections 856-858 of the Internal Revenue Code of 1954, as amended, . . . This Trust is not intended to be and shall not be deemed to be a general partnership, limited partnership, corporation, joint venture, joint stock company or joint stock association . . ." (15a)

Alison obtained a permit from the California Corporations Commission on October 20, 1969, (12a) which conclusively established Alison's status, under California law, as a real estate investment trust, as provided in Section 23002 of the California Corporations Code which then read, in part:

> "A permit issued by the Commissioner of Corporations finding that an unincorporated trust or association is a real estate investment trust shall be conclusive evidence thereof . . . as to all persons who become

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* Sections 20000 through 24000 of the California Corporations Code are headed "Title 3. Unincorporated Associations".

shareholders or beneficiaries of the unincorporated trust or association . . ."*

Yet, Bohack avers that despite the clear and unequivocal language of the California Corporations Code, Alison is still *really* a corporation (Appellant's Brief, pp. 6ff.). First, it contends that New York and California treat a REIT as a corporation for tax purposes.** Even if this were so, Bohack has again missed the point. The issue is not whether a REIT is to be taxed *as* a corporation, but whether a REIT *is* a corporation. Second, Bohack cites *Matter of Bankers Trust,* 403 F.2d 16 (7th Cir. 1968) for the proposition that, where federal jurisdiction is predicated under the bankruptcy laws, venue is proper in the judicial district where a REIT maintains its principal place of business. However, to claim that this case held that "business trusts should be treated generally as analogous to corporations" for diversity purposes (Appellant's Brief, p. 13), as Bohack evidently does, is clearly fallacious.

Bohack also argues that were it not for Subchapter M of the Internal Revenue Code a REIT such as Alison would be taxed as a corporation (Appellant's Brief, p. 6ff). Again,

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* Evidently, there was concern among the California bar that a REIT might be treated as a partnership and not a trust by the California Courts because of a California Division of Corporations requirement that trustees be elected annually by the shareholders. To protect against such a finding and the resultant shareholder liability, § 23002 was enacted. Roberts, *"Public Ownership of Real Estate—Real Estate Trust Laws Provide New Impetus"*, 9 U.C.L.A. Law. Rev. 564, 589 (1962).

** California Corporations Code § 17009, cited by Bohack for this proposition (Appellant's Brief, p. 13), does not exist. While California Bank and Corporation Tax Law § 23038 does provide that a Massachusetts or business trust is to be treated *as a* corporation for tax purposes together with all non-banking associations, including certain nonprofit associations, this fact has no bearing on whether Alison *is* a corporation under California law.

Bohack altogether misses the point. Quite simply, if it were not for Subchapter M, Alison would never have existed.*

The correct analysis of the citizenship of an unincorporated association for diversity purposes focuses on state laws defining business associations and not on concepts developed for tax purposes. Such an analysis of state law was made by this Court in *Baer* v. *United Services Automobile Association, supra,* where this Court raised the issue of federal court jurisdiction *sua sponte* and undertook its own investigation of the relevant state statutes. While the Court's investigation revealed considerable similarity between an insurance corporation and a reciprocal insurance association (i.e., United Services Automobile Association), particularly with respect to applicable insurance qualification and supervision standards, it concluded:

> "There is no evident intention that this supervision is designed to intrude upon the traditional distinction drawn between corporations and reciprocal insurance associations, *no matter how insignificant that distinction may appear to be as a practical matter.*" 503 F.2d 394-5 (emphasis supplied).

Having concluded that under Texas law a reciprocal insurance association is not a corporation, this Court concluded that under *Bouligny* the existence of the formal distinction under Texas law between a reciprocal insurance

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* In fact, if Subchapter M were repealed tomorrow, or if Alison, like some REITS, relinquished its Subchapter M status, Alison would still remain a real estate investment trust under the laws of the State of California. Without Subchapter M, Alison would presumably be federally taxed as a corporation, Treas. Reg. § 301.7701-2, *et seq. Cf. Outlaw* v. *United States,* 494 F.2d 1376 (Ct. Cl.), cert. denied, 419 U.S. 844 (1974), as are many other unincorporated associations, including some limited partnerships, joint stock associations and other unincorporated entities.

association and a corporation was:

> ". . . . dispositive on the issue of whether the reciprocal should be considered a corporation for diversity purposes, irrespective of whether the distinction is, as a practical matter, an artificial or illogical one. *The existence of the distinction under state law, and not the logic underlying that distinction, is the paramount consideration.*" 503 F.2d at 395. (emphasis supplied.)

Such an analysis in the instant case clearly reveals that under California law a real estate investment trust and a corporation are distinct entities.

C. Federal District Courts Have Uniformly Found REITS To Be Unincorporated Associations For Diversity Purposes.

Since Alison is not a corporation under California law, it is not a corporation for diversity purposes. In several recent decisions, district courts have reached precisely this same conclusion with respect to entities almost identical to Alison.

In *Fox* v. *Prudent Resources Trust,* 382 F. Supp. 81 (E.D. Pa. 1974), the plaintiff instituted an action against Prudent, a business trust organized under the laws of the State of New York, alleging acts of securities fraud, corporate mismanagement, etc. The plaintiff contended that although Prudent was a business trust, it should be treated as a corporation for diversity purposes and deemed a citizen of New York, the state where it was organized.

The court, in reviewing precedent, found the logic and reasoning of the "scholarly opinion" in *Mason* "impressive" (382 F. Supp. at 92), but further stated:

> ". . . . language in the Supreme Court's decision in [Bouligny] convinces me that I am not free to embrace the Mason approach. In that case the

> court held that an unincorporated labor union is not a 'citizen' for the purposes of diversity jurisdiction, its citizenship being instead that of each of its members. More important for this case, the Supreme Court recognized the appeal of ascertaining whether unincorporated associations had distinct 'juridical personalities' but concluded that appeals to widen diversity jurisdiction were properly directed at Congress, rather than at the courts. Title 28 U.S.C. § 1332(c) specifically deals with the problem of corporations for diversity purposes; for unincorporated associations to be deemed citizens of a single state, a similar statutory provision would be required. On the basis of Bouligny, I conclude that Prudent Resources Trust is not a citizen of New York, and that this court does not have diversity jurisdiction over Fox's state claims." 382 F. Supp. at 92-3.

Similarly, in *Larwin Mortgage Investors* v. *Riverdrive Mall, Inc.,* 392 F. Supp. 97 (S.D. Tex. 1975), the District Court held that Larwin, a California real estate investment trust, like Alison, was for the purposes of 28 U.S.C. § 1332 a citizen of each state in which any of its shareholders resided. The court dismissed the action, finding no predicate for the exercise of federal jurisdiction.

In two other reported District Court cases, decided after *Larwin,* REITS were again held to be unincorporated associations for diversity purposes with the result that actions commenced by them were dismissed for lack of subject matter jurisdiction. *Chase Manhattan Mortgage & Realty Trust* v. *Pendley,* 405 F. Supp. 593 (N.D. Ga. 1975); *Jim Walter Investors* v. *Empire Madison, Inc.,* 401 F. Supp. 425 (N.D. Ga. 1975).

Thus, in every known case in which the issue has been presented it has been held that for diversity purposes business trusts and REITS are citizens of each state in which their respective shareholders reside.

POINT III

Congress, not the federal courts, is the appropriate forum for the expansion of the jurisdiction of the federal courts.

The Supreme Court in *Bouligny, supra,* recognized that an expansion of federal diversity jurisdiction must come from Congress rather than the federal courts, when it wrote:

> "We are of the view that [arguments for the expansion of jurisdiction], however appealing, are addressed to an inappropriate forum, and that pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts." 382 U.S. at pp. 150-1.

The Supreme Court also recognized the problems inherent in such an expansion of diversity jurisdiction* by judicial rather than legislative fiat. Such problems would include the establishment of standards for determining which of the many varieties of unincorporated associations should be treated as corporations for diversity purposes. In fact, the federal courts have consistently treated all unincorporated associations differently from corporations for diversity purposes and it would certainly be arbitrary to draw the line at REITS.

For example, the following entities have been deemed unincorporated associations and not "corporations" for

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* The desirability of the contraction rather than expansion of federal diversity jurisdiction has been the subject of much recent commentary. See generally, Friendly, H.J., *Federal Jurisdiction: A General View* (Col. U. P. 1973) pp. 139-152; Annual Report on the State of the Judiciary by the Hon. Warren E. Burger, reported at 96 Sup. Ct. Rep.—No. 9, p. 5. (March 1, 1976).

diversity purposes:

(1) partnerships, see e.g., *Lewis* v. *Odell*, 503 F.2d 445 (2nd Cir. 1974);

(2) limited parnerships, see e.g., *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U.S. 449 (1900); *Colonial Realty Corp.* v. *Bache & Co.*, 358 F.2d 178 (2nd Cir.), *cert. denied*, 385 U.S. 817 (1966); *Erving* v. *Virginia Squires Basketball Club*, 349 F. Supp. 709 (E.D.N.Y.), *aff'd*, 468 F.2d 1064 (2nd Cir. 1972);

(3) joint ventures, see e.g., *Carson Const. Co.* v. *Fuller-Webb Const.*, 198 F. Supp. 464 (D. Mont. 1961);

(4) joint stock associations, see e.g., *Brocki, supra; Chapman, supra;*

(5) labor unions, see e.g., *Bouligny, supra;*

(6) reciprocal insurance exchanges, see e.g., *Baer, supra;* and

(7) various other unincorporated associations and entities, see generally, 13 Wright & Miller & Cooper, *Federal Practice and Procedure*, § 3630 (West 1975).

Certainly, the assimilation of a REIT or any unincorporated association into Section 1332(c) of Title 28 of the United States Code at this time would be contrary to the holdings of *Baer, Bouligny* and other cases cited herein and any expansion of federal diversity jurisdiction to include this case must come from Congress.

CONCLUSION

The decision below was correct, is consistent with the decisions of this Court and the Supreme Court and should be affirmed.

Respectfully submitted,

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THE UNITED STATES COURT OF APPEALS ::: FOR THE SECOND CIRCUIT

BOHACK

V

ALISON MORTGAGE

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NY , ss:

H AFRIM HASKAJ being duly sworn,

deposes and says that he is over the age of 18 years and resides at 1481 42nd st, Bklyn

That on the 16th day of april, 1976 19 at

he served the annexed brief for defendant-appellee upon

Shaw & Levine, 770 Lexington avenue, NY, NY

in this action, by delivering to and leaving with said attorneys

~~his~~ two true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 16th day of april, 1976 19

Afrim Haskaj

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 19 77